

123 FERC ¶ 61,204
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Southern Company Services, Inc.

Docket No. ER08-756-000

ORDER ACCEPTING TARIFF AND PRO FORMA SERVICE AGREEMENT

(Issued May 27, 2008)

1. On March 28, 2008, Southern Company Services, Inc., acting as agent for Alabama Power Company (Alabama Power), Georgia Power Company, Gulf Power Company, and Mississippi Power Company, (collectively, Southern Companies or Operating Companies), filed a Transmission Facility Cost Allocation Tariff (Cost Allocation Tariff) and Pro Forma Service Agreement (Service Agreement) pursuant to section 205 of the Federal Power Act (FPA)¹ and section 35 of the Commission's Rules of Practice and Procedure.² Southern Companies state that the Cost Allocation Tariff and Service Agreement will provide the contractual vehicle for these transmission-owning operating company affiliates to allocate cost responsibility among themselves for certain upgrades to the transmission system of one affiliate by another affiliate, and will prevent cross-subsidization between retail ratepayers and promote transmission infrastructure development. In this order, the Commission accepts the Cost Allocation Tariff and Service Agreement.

I. Background

2. Southern Companies are transmission-owning operating company affiliates and are each subsidiaries of The Southern Company, a public utility holding company. Each subsidiary of The Southern Company is a traditional, vertically-integrated public utility, and each owns and operates generation, transmission, and distribution facilities and provides electric service for retail and wholesale customers in its service area. Southern

¹ 16 U.S.C. § 824d (2000).

² 18 C.F.R. § 35.12 (2007).

Companies are regulated by their respective state public service commissions and by this Commission. They have coordinated and integrated their electric utility system operations and planning in order to achieve economies of scale, and they operate as an integrated system under a single control area.

3. Southern Companies are each responsible for the costs associated with serving their respective retail customers. They state that they have experienced and anticipate future instances in which one of the Operating Companies will incur costs (the Burdened Operating Company) associated with transmission system improvements or upgrades undertaken for the benefit of another Operating Company (Benefited Operating Company), as the improvements relate to serving the Benefited Operating Company's retail load. Southern Companies state that because the Burdened Operating Company and Benefiting Operating Company are both responsible for the costs incurred in improving, upgrading, or using their own transmission systems in order to provide service to their own retail customers, they need a contractual cost-allocation agreement to ensure that the Benefited Operating Company bears its appropriate share of such costs when incurred by the Burdened Operating Company.

II. Notice of Filing and Responsive Pleadings

4. Notice of Southern Companies' filing was published in the *Federal Register*, 73 Fed. Reg. 19,203 (2008), with interventions and protests due on or before April 18, 2008. Alabama Municipal Electric Authority (AMEA) filed a timely motion to intervene and protest. On May 5, 2008, Southern Companies filed an answer to AMEA's protest.

III. Discussion

A. Procedural Matters

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Southern Companies' answer because it has provided information that assisted us in our decision-making process.

B. Parties' Arguments

1. Southern Companies' Filing

6. Southern Companies explain that Commission approval of the Cost Allocation Tariff will ensure that the Burdened Operating Company is properly reimbursed for the costs it incurs on behalf of and for the benefit of the Benefited Operating Company.

Southern Companies state that without the Cost Allocation Tariff, a disproportionate share of the costs would be borne by the Burdened Operating Company's retail customers. They add that Commission acceptance of the Cost Allocation Tariff will ensure that costs of future system improvements will be borne by the Operating Company that is both the cause and beneficiary of such events, eliminating the potential for cross-subsidization between the Operating Companies' retail customers.³

7. Further, Southern Companies state that eliminating the potential for cross-subsidization will minimize any concerns regarding transmission investment cost recovery by the Burdened Operating Company, and therefore facilitate the development of additional transmission infrastructure by the Operating Companies. Southern Companies state that Commission acceptance of the Cost Allocation Tariff should facilitate the participation of independent power producers (IPPs) in the Operating Companies' competitive solicitations for network generating resources by addressing any potential concern regarding transmission investment cost recovery.⁴

8. Southern Companies explain that the proposed Cost Allocation Tariff will be a stand-alone tariff pursuant to which the Operating Companies will execute service agreements to allocate the costs associated with specific transmission system upgrades. Southern Companies state that their open access transmission tariff (OATT) is not the appropriate contractual vehicle to address this situation because, for purposes of serving bundled retail load, none of the Operating Companies execute service agreements with one another, nor do they take service from each other under Southern Companies' OATT.⁵ Rather, by assuming cost responsibility for their respective transmission systems, the Operating Companies fund the carrying costs of their total transmission investment. According to Southern Companies, this means that each individual Operating Company is responsible for all of the costs associated with its transmission system, unless other users of the transmission system bear some of the burden.

³ Southern Company Services Inc., March 28, 2008 Filing at 2 (March 28 Filing).

⁴ *Id.* at 3.

⁵ *Id.* (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,745, 31,728 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)).

9. Southern Companies state that the payments made and received by the Benefited and the Burdened Operating Companies under the proposed Cost Allocation Tariff will result in off-setting credits and expenses for those Operating Companies.⁶ According to Southern Companies, the off-setting credits and expenses will negate any potential effect on the calculation of rates or charges under Southern Companies' OATT, and will ensure that each Operating Company's retail customers will bear the appropriate cost responsibility for those transmission cost-allocation events that were performed for their benefit.

10. Under Southern Companies' proposed Cost Allocation Tariff, when a Burdened Operating Company incurs transmission related costs associated with serving the Benefited Operating Company's retail load, the Benefited Operating Company will bear the carrying costs attributable to the underlying transmission cost allocation event in the form of a Monthly Facilities Charge during the term of the Service Agreement.⁷ Southern Companies state that the cost support and data inputs used in the formula rate to calculate the Monthly Facilities Charge will be taken from the Burdened Operating Company's most recent FERC Form 1 data.⁸

11. The Cost Allocation Tariff and Service Agreement allow the Burdened Operating Company to elect to have the Benefited Operating Company pay the Monthly Facilities Charge in the form of either a fixed monthly charge based on the net present value of the total annual carrying costs of the transmission system-related costs at issue (Levelized Monthly Facilities Charge), or a monthly payment based on the declining annual revenue requirement for the transmission system-related cost at issue (Declining Monthly Facilities Charge).⁹ Southern Companies explain that section 6.2 of the Cost Allocation Tariff describes the procedure and the basis for the calculation of either form of the Monthly Facilities Charge, and state that the Service Agreement includes an attachment that describes all of the components used to calculate the Monthly Facilities Charge.¹⁰ According to Southern Companies, the Cost Allocation Tariff, which uses the Burdened Operating Company's most recent FERC Form 1 data as the cost support and data inputs to calculate the Monthly Facilities Charge under the formulas set forth in section 6.2, is

⁶ *Id.* at 4.

⁷ *Id.* at 5.

⁸ *Id.* at 5-6.

⁹ *Id.* at 5.

¹⁰ *Id.*

substantially similar in nature and purpose to Transmission Facilities Agreements previously accepted by the Commission.¹¹

12. Southern Companies explain that the Cost Allocation Tariff will provide the framework and methodology pursuant to which the Burdened and Benefited Operating Companies will allocate transmission system-related costs in the future. They explain that each such instance will be addressed through a conforming service agreement that will be filed with the Commission pursuant to the Commission's Electric Quarterly Report (EQR) filing requirements.¹² According to Southern Companies, this arrangement will avoid the administrative burden of filing individual rate schedules each time the Operating Companies need to allocate transmission system costs among themselves.¹³

2. AMEA's Protest

13. AMEA requests that the Commission reject the Cost Allocation Tariff and Service Agreement, or, in the alternative, suspend them for five months and set them for hearing. AMEA argues that the proposed Cost Allocation Tariff worsens the lack of comparable rates AMEA has experienced as a network customer under Southern Companies' OATT. Specifically, AMEA argues that comparability requires that a transmission provider's use of its transmission system for bundled retail service be comparable to its treatment of wholesale customers using the transmission system to serve their native load.¹⁴ AMEA contends that the comparability issues raised by the instant filing and tied to those already being addressed by the Commission on rehearing in Docket No. EL06-93-001. Thus,

¹¹ *Alabama Power Company (Alabama Power)*, Docket No. ER05-398-000, at 2 (May 25, 2005) (unpublished letter order); *Savannah Electric and Power Company (Savannah Electric)*, Docket No. ER05-398-000, at 2 (May 25, 2005) (unpublished letter order). *See also* March 28, 2008 Filing at 5.

¹² *Id.* at 6 (citing *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, at P 18, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003)).

¹³ *Id.*

¹⁴ AMEA April 18, 2008 Protest at 8 (citing *American Electric Power Service Corp.*, 67 FERC ¶ 61,168, at 61,490 (1994)).

AMEA requests that the outcome of the instant proceeding be made contingent on the outcome of the proceedings in Docket No. EL06-93-001.¹⁵

14. AMEA argues that while the Cost Allocation Tariff is not part of the Southern Companies' OATT, in order to achieve comparability of service, load under the OATT must be treated in a manner comparable to how native load would be treated under the Cost Allocation Tariff. In support of this argument, AMEA states that the comparability of transmission pricing under the Commission's Transmission Pricing Policy Statement encompasses the comparison of jurisdictional and non-jurisdictional services and is not confined to non-discrimination among jurisdictional unbundled services.¹⁶ Additionally, AMEA argues that Order No. 890 confirms that Southern Companies must provide open access transmission service to third parties that is comparable to the way that the Southern Companies use their transmission system to serve bundled retail native-load customers.¹⁷

15. Further, AMEA contends that the proposed Cost Allocation Tariff would insulate Alabama Power's native load from the costs of transmission facilities used to serve other Operating Companies' native load. It argues that it has demonstrated that the system-wide, postage-stamp rates provided for in Southern Companies' OATT are unduly discriminatory because they force AMEA and its members to pay the higher average transmission costs of the entire Southern Companies' system.¹⁸ According to AMEA, being required to pay higher, system-wide, postage-stamp OATT rates places AMEA's member cities at a competitive disadvantage relative to their primary retail competitor, Alabama Power, and similarly places AMEA at an unjustified competitive disadvantage relative to wholesale competitor Alabama Power.¹⁹

16. AMEA states that the Cost Allocation Tariff does not affect the rates and charges under Southern Companies' OATT, and therefore would not protect AMEA's network

¹⁵ AMEA April 18, 2008 Protest at 3.

¹⁶ *Id.* at 9-10 (citing *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*, FERC Stats. & Regs. ¶ 31,005, at 31,141-42 (1994), *clarified*, 71 FERC ¶ 61,195 (1995)).

¹⁷ *Id.* at 11 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 489-95, 770, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007)).

¹⁸ *Id.* at 13.

¹⁹ *Id.*

load from bearing a share of the costs of the upgrades or uses of Alabama Power's transmission system that benefit only Georgia Power's native load, and not Alabama Power's native load.²⁰ Further, AMEA argues that, in violation of the comparability requirement, neither Southern Companies' OATT nor Southern Companies' Cost Allocation Tariff provides protection for AMEA or the retail customers of AMEA's member cities similar to that afforded to Alabama Power's native-load customers under the Cost Allocation Tariff.²¹

17. AMEA contends that Commission approval of the Cost Allocation Tariff would use federal law to ensure non-comparable OATT rates and that the remedy for this lack of comparability lies squarely within the Commission's jurisdiction. AMEA argues that Commission approval of the Cost Allocation Tariff and the Service Agreement would appear to preempt state regulation of a portion of the Operating Companies' costs of providing retail service. It alleges that the transmission costs that would be reallocated under the Cost Allocation Tariff would include transmission costs that are recovered in bundled retail rates. AMEA contends that the Cost Allocation Tariff appears to preempt any inquiry by state regulators as to whether an Operating Company prudently incurred such reallocated transmission costs.²² AMEA concludes that the diminution of comparability would be caused exclusively by the operation of federal law, and that the remedy for this is within the exclusive authority of the Commission.

18. AMEA contends that the Cost Allocation Tariff would give Southern Companies wide discretion to reallocate transmission costs so as to disfavor IPPs and favor Southern Companies' own wholesale merchant arm, and that this is unduly discriminatory.²³ It asserts that while the Cost Allocation Tariff provides a contractual mechanism for reallocating transmission costs, it does not provide any discernable standards governing the cost reallocations themselves.²⁴ AMEA further contends that the Cost Allocation Tariff gives Southern Companies the ability to unduly discriminate when computing the Monthly Facilities Charge because under section 4.1 of the Cost Allocation Tariff, a

²⁰ *Id.* at 14.

²¹ *Id.* at 15.

²² *Id.* at 16 (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986); *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39, 42 (2003)).

²³ *Id.* at 17.

²⁴ *Id.*

Burdened Operating Company can discriminate against IPPs by its choice of methodologies for computing the Monthly Facilities Charge.²⁵

19. Finally, AMEA argues that Southern Companies' Cost Allocation Tariff is flawed because Southern Companies propose not to file the individual service agreements that would reallocate transmission costs among the Operating Companies before they become effective, but rather propose to file service agreements after they become effective using the Commission's EQR procedures. AMEA contends that these service agreements do not qualify for EQR treatment because the Cost Allocation Tariff is not a tariff of general applicability.²⁶ AMEA further asserts that the Cost Allocation Tariff and Service Agreement are so lacking in details that the Commission cannot make the requisite initial determination of the reasonableness of the Service Agreement, and therefore, approval of EQR filings cannot be justified.²⁷ AMEA contends that allowing EQR treatment of the service agreements would deny OATT customers and the public the opportunity to detect and protest the piecemeal erosion of comparability under the Southern Companies' OATT.²⁸

3. Southern Companies' Answer

20. In their answer, Southern Companies argue that AMEA has previously raised the arguments in its protest, that the Commission has rejected those arguments, and that the arguments are irrelevant to the instant proceeding.²⁹ Southern Companies state that the Commission concluded that AMEA's competition concerns were unfounded in the proceeding involving SeTrans Regional Transmission Organization, where it rejected AMEA's argument that comparability required Southern Companies to have separate OATT rates for its different operating companies.³⁰ Southern Companies add that the Commission rejected these same arguments when AMEA raised them in a complaint proceeding.³¹ Southern Companies argue that as the Commission recognized in that

²⁵ *Id.* at 18.

²⁶ *Id.* at 19 (citing Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 18).

²⁷ *Id.* (citing Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 196).

²⁸ *Id.* at 3, 18.

²⁹ Southern Company Services Inc. May 5, 2008 Answer at 6. (citing *Cleco Power LLC*, 103 FERC ¶ 61,272, at P 29 (2003); *Alabama Municipal*, 119 FERC ¶ 61,286 (2007)).

³⁰ *Id.* (citing *Cleco Power LLC*, 103 FERC ¶ 61,272, at P 29 (2003)).

³¹ *Id.* at 7 (citing *Alabama Municipal*, 119 FERC ¶ 61,286).

proceeding, AMEA's arguments, which are identical to those underlying AMEA's protest of the Cost Allocation Tariff, "'hinge[] on one important question – the scope of the Commission's comparability standard.'" ³² Southern Companies state that in *Alabama Municipal*, the Commission found that AMEA's interpretation of comparability was wrong. ³³

21. Southern Companies argue that AMEA is attempting to "inappropriately hijack this proceeding to provide it with another forum to reargue an issue that has been flatly rejected by the Commission now on two separate occasions and has no bearing on Southern Companies' proposed Cost Allocation Tariff...." ³⁴ Southern Companies conclude that the Commission must reject AMEA's protest because it is premised on the same faulty interpretation of comparability that AMEA has previously presented.

22. Southern Companies also assert that AMEA uses all of Southern Companies' network, and not just Alabama Power's transmission facilities. Thus, Southern Companies argue that AMEA is seeking permission to use Southern Companies' entire integrated transmission system but to pay for such service based on an Alabama-only zonal rate. ³⁵ Southern Companies argue that AMEA provides no rational basis to support its argument that the Cost Allocation Tariff will enable Southern Companies to discriminate against IPPs. They state that AMEA resorts to an arbitrary isolation of individual terms within the Cost Allocation Tariff in an attempt to create the impression that there is a lack of clarity. ³⁶ Southern Companies add that AMEA offers no examples of how discrimination against IPPs could result when computing the Monthly Facilities Charge, thus AMEA's argument in this regard should be rejected. ³⁷ Further, Southern Companies contend that AMEA's claims disregard the facts that: (1) Southern Companies offer all services, to both IPPs and Southern Power, pursuant to the same OATT and under the same terms and conditions; and (2) any Southern Companies power

³² *Id.* (quoting *Alabama Municipal*, 119 FERC ¶ 61,286, at P 36).

³³ *Id.* at 8 (quoting *Alabama Municipal*, 119 FERC ¶ 61,286, at P 38).

³⁴ *Id.*

³⁵ *Id.* at 9.

³⁶ *Id.* at 10.

³⁷ *Id.* at 11 (citing 18 C.F.R. § 203(a)(7); *Energy Management Corp. v. Peoples Gas System, Inc.*, 78 FERC ¶ 61,044 (1997); *Cities of Anaheim v. California Indep. Sys. Operator*, 95 FERC ¶ 61,197 (2001)).

supply request for proposals (RFP) in which Southern Power may participate, must follow the Commission's affiliate RFP requirements.³⁸

23. Southern Companies argue that, the Cost Allocation Tariff will be a tariff for generally-applicable service under section 35 of the Commission's regulations, and therefore, related service agreements must be filed pursuant to the Commission's EQR filing requirements.³⁹ Southern Companies assert that AMEA's argument that the Cost Allocation Tariff is not appropriate for EQR reporting procedures disregards the text of the Commission's regulations. It instead inappropriately focuses on the scope of eligible customers under the Cost Allocation Tariff rather than on the scope of the actual service being offered under the Cost Allocation Tariff.⁴⁰

24. Southern Companies also state that the Cost Allocation Tariff will be a stand-alone tariff under section 35 of the Commission's regulations, and that, together with the standard form of service agreement, it sets forth all of the general terms and conditions pursuant to which all eligible customers will take service. Southern Companies state that the Cost Allocation Tariff is not restricted in its availability as to any eligible customer, nor is its applicability limited to a specific transaction. Rather, it is applicable to any future instance in which an eligible customer needs to allocate transmission system-related costs incurred for the benefit of another eligible customer. Therefore, according to Southern Companies, it is precisely the type of tariff to which the Commission's EQR filing requirements were intended to apply.⁴¹ In addition, Southern Companies state that the Cost Allocation Tariff and Service Agreement provide all of the information required by the Commission's EQR filing regulations, as well as by the regulations pertaining to the filing of an initial rate schedule. Southern Companies argue that AMEA's claim that application of sections 35.10a and 35.10b of the Commission's regulations to the Cost Allocation Tariff will "make it impossible for AMEA and other customers to protest their steadily-eroding, non-comparable treatment under each Service Agreement" demonstrates that AMEA's position on this issue is nothing more than a collateral attack of the Commission's rejection of the same argument.⁴²

³⁸ *Id.* at 11 (citing *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991); *Allegheny Energy Supply, Inc.*, 108 FERC ¶ 61,082, at P 22 (2004)).

³⁹ *Id.* at 13 (citing 18 C.F.R. §§ 35.10a and 35.10b (2007)).

⁴⁰ *Id.* at 14 (citing 18 C.F.R. § 35.10a(a) (2007)).

⁴¹ *Id.* at 14-15.

⁴² *Id.* at 16 (quoting AMEA April 18, 2008 Protest at 18).

C. Commission Determination

25. For the reasons discussed below, the Commission will accept Southern Companies' proposed Cost Allocation Tariff and Pro Forma Service Agreement, to be effective May 28, 2008. We will also accept Southern Companies' proposal to file conforming service agreements executed under the proposed Cost Allocation Tariff with the Commission pursuant to the EQR filing requirements.

26. We disagree with AMEA's argument that the Cost Allocation Tariff and Service Agreement should be rejected because they exacerbate Southern Company Services's and Alabama Power's violation of the Commission's comparability standard. We find that AMEA has previously raised, and the Commission has previously rejected, the arguments upon which AMEA's protest is premised. Specifically, with respect to AMEA's argument that Southern Companies' proposed Cost Allocation Tariff worsens an existing lack of comparable rates, we find that the Commission rejected this same argument by AMEA in *Alabama Municipal*. In that order, the Commission concluded that:

Moreover, recognizing that comparability is more limited than AMEA would wish, its argument that Southern Companies' system-wide, postage-stamp rate methodology is no longer just and reasonable becomes unavailing. AMEA's argument rests on its claim that Southern Companies' system-wide, postage stamp rates cannot be just and reasonable because comparability requires that AMEA receive the same rate for its unbundled wholesale transmission service as Alabama Power provides for its bundled retail sales. Because we find AMEA's interpretation of comparability to be wrong, AMEA's argument built on that claim is also wrong. Southern Companies' system-wide, postage stamp rates are, as relevant here, not unduly discriminatory. AMEA will pay the same transmission rate as any unbundled transmission customer on the Southern Companies' system, including Southern Companies' itself.^[43]

As in *Alabama Municipal*, AMEA's argument that the proposed Cost Allocation Tariff and Service Agreement worsen the existing lack of comparable rates, rests on AMEA's claim that Southern Companies' system-wide, postage-stamp rates cannot be just and reasonable because comparability requires that AMEA receive the same rate for its unbundled wholesale transmission service as Alabama Power provides for its bundled retail sales.⁴⁴ AMEA has not provided any evidence of changes in facts or circumstances

⁴³ *Alabama Municipal*, 119 FERC ¶ 61,286 at P 38.

⁴⁴ AMEA April 18, 2008 Protest at 8-16.

that would change the Commission's conclusion that AMEA's interpretation of comparability is wrong. AMEA's arguments regarding the Cost Allocation Tariff and Service Agreement that are built on that faulty premise are, therefore, unavailing. Further, we find that AMEA has not connected the lack of comparability that it perceives under Southern Companies' OATT to the instant proceeding, in which it claims that the Cost Allocation Tariff will add to the existing lack of comparable service under Southern Companies' OATT. In this regard, AMEA fails to clearly explain how its service as a network customer under Southern Companies' OATT is affected by the Cost Allocation Tariff. In fact, in its protest AMEA states that "[t]he Cost Allocation Tariff does not affect rates and charges under Southern Companies OATT."⁴⁵

27. We reject AMEA's argument that Commission approval of the Cost Allocation Tariff and Service Agreement would appear to preempt state regulation of a portion of the Operating Companies' costs of providing retail service because transmission costs that would be reallocated under the Cost Allocation Tariff would include transmission costs that are recovered in bundled retail rates, and that this would result in "additional diminution of comparability [that] would be caused exclusively by the operation of *federal law*."⁴⁶ Because AMEA's argument in this regard does not specify what costs are recovered in retail rates, the Commission is not able to find that Southern Companies' filing is not just and reasonable on this basis. In addition, as the Commission explained in *Alabama Municipal*, AMEA's argument that it should receive the same rate for its unbundled wholesale transmission service as Alabama Power provides for its bundled retail sales:

would have us lower Southern Companies' wholesale transmission rate to match the transmission component of Alabama Power's bundled retail rate. However, this option would effectively require the Commission to use state-set rates as the Commission-jurisdictional rate, and would turn a long-standing Congressionally-established and judicially-sanctioned regulatory scheme on its head. Moreover, in the context of multi-state holding companies (as is the case here), where the Commission has determined that a system-wide wholesale transmission rate for members of the holding company is necessary to achieve a just and reasonable rate for use of transmission across the holding company, lowering the wholesale transmission rate for only one of the holding company's transmission provider utilities would mean that that utility either under-recovers its transmission costs or that that utility's costs would be shifted to customers

⁴⁵ *Id.* at 14.

⁴⁶ *Id.* at 16 (emphasis in original).

served by other transmission provider utilities of the holding company. Neither result is permissible or acceptable.^[47]

Thus, we reject AMEA's argument that the Commission should reject the Cost Allocation Tariff and Service Agreement because transmission costs that would be reallocated under the Cost Allocation Tariff would include transmission costs that are recovered in bundled retail rates.

28. We disagree with AMEA's argument that the Cost Allocation Tariff is not a tariff of general applicability under which conforming service agreements may be filed with the Commission pursuant to the Commission's EQR filing requirements. Southern Companies' proposed Cost Allocation Tariff meets the requirements for a tariff for generally applicable service under section 35 of the Commission's regulations.⁴⁸ The Cost Allocation Tariff, together with the Pro Forma Service Agreement, sets forth all of the general terms and conditions pursuant to which all eligible customers will take service, and is generally applicable to any future instance in which an eligible customer needs to allocate transmission system-related costs incurred for the benefit of another eligible customer. Accordingly, we find that service agreements executed under the Cost Allocation Tariff may be filed with the Commission pursuant to the EQR filing requirements.

29. We also reject AMEA's argument that the Cost Allocation Tariff allows Southern Companies to unduly discriminate against IPPs when computing the Monthly Facilities Charge under section 6.2 of the Cost Allocation Tariff. The method used to compute the

⁴⁷ *Alabama Municipal*, 119 FERC ¶ 61,286 at P 39 (citing *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004) ("states are prevented from taking regulatory authority in derogation of federal regulatory objectives"); *Barton Village Inc.*, 100 FERC ¶ 61,244, at P12 (2002) ("Under the Federal Power Act ... the Commission has exclusive jurisdiction over [] wholesale power sales rates ... [t]hus, we have no legal obligation to review, much less rely on, the findings of the [state]"); *Progress Energy*, 97 FERC ¶ 61,141, at 61,628 (2001) ("in light of this Commission's exclusive jurisdiction under the [FPA] over the rates, terms and conditions of sales for resale of electric energy in interstate commerce...."); *Louisiana Pub. Serv. Comm'n v. Entergy Serv., Inc.*, 76 FERC ¶ 61,168, at 61,955 (1996) ("a ratemaking methodology proposed at the retail level ... does not govern the Commission's determination of the appropriate ratemaking methodologies to be used in developing wholesale rates") (citations omitted), *reh'g denied*, 80 FERC 61,282 (1997), *rev'd on other grounds*, 184 F.3d 892 (1999); Order No. 888, FERC Stats & Regs. ¶ 31,036 at 31,728).

⁴⁸ See 18 C.F.R. §§ 35.10a; 35.10b (2007).

Monthly Facilities Charge provided for in section 6.2 is the same method that the Commission previously authorized Southern Companies to use under their OATT.⁴⁹ Nothing in the record of this case changes the Commission's conclusion that this process is just and reasonable. With regard to AMEA's argument that the Cost Allocation Tariff does not provide any discernable standards governing the cost reallocations themselves, we find that section 6 of the Cost Allocation Tariff and the corresponding Service Agreement provide detailed criteria for how the costs of transmission system upgrades will be determined and allocated. We remind Southern Companies, however, that consistent with *American Electric Power Service Corporation*, once a method is selected for computing the Monthly Facilities Charge, it cannot be changed without first submitting any proposed changes for filing and approval by the Commission.⁵⁰

30. Finally, we will deny AMEA's request that the outcome of the instant proceeding be made contingent on the outcome of the proceedings in *Alabama Municipal*. AMEA's protest to Southern Companies' proposed Cost Allocation Tariff and Service Agreement raises the same arguments regarding comparability that AMEA raised in Docket No. EL06-93. As we recently stated in *Alabama Municipal*, the comparability standard is not violated because it does not require that AMEA receive the same rate for its unbundled wholesale transmission service as Alabama Power provides for its bundled retail rates.⁵¹ AMEA has not provided any evidence of changes in facts or circumstances that would change the Commission's conclusion in *Alabama Municipal*, and thus we reach the same conclusion here. In any event, the fact that *Alabama Municipal* is pending rehearing does not prevent us from accepting the Cost Allocation Tariff and Service Agreement for filing because not accepting the Cost Allocation Tariff and Service Agreement due to pending rehearing would frustrate the implementation of Commission orders and create regulatory uncertainty. The Commission may rely on contested orders even though they

⁴⁹ *Alabama Power Company*, Docket No. ER05-398-000, at 2 (May 25, 2005) (unpublished letter order); *Savannah Electric and Power Company*, Docket No. ER05-398-000, at 2 (May 25, 2005) (unpublished letter order). See also March 28, 2008 Filing at 5.

⁵⁰ Opinion No. 440, 88 FERC ¶61,141, at 61,441 (1999) (affirming the ALJ's initial decision to deny AEP's request to switch to levelized rates from its net plant method "after nearly one-third of AEP's transmission system already has been depreciated without making adjustments to prevent over-recoveries" and finding that the use of a levelized gross plant rate would not produce a just and reasonable result), *withdrawal of reh'g granted*, 92 FERC ¶ 61,001 (2000).

⁵¹ *Alabama Municipal*, 119 FERC ¶ 61,286 at P 38.

are pending on rehearing because the Commission's decisions are final and effective unless they have been stayed.⁵²

31. We find that Southern Companies' proposed Cost Allocation Tariff and Pro Forma Service Agreement are just and reasonable, and have not been shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept Southern Companies' proposed Cost Allocation Tariff and Service Agreement for filing to become effective May 28, 2008. As we can make this determination based on the written record of this proceeding, we find that a hearing is unnecessary and will deny AMEA's request that we set Southern Companies' filing for hearing.

The Commission orders:

(A) Southern Companies' proposed Cost Allocation Tariff and Pro Forma Service Agreement are hereby accepted, as discussed in the body of this order, effective May 28, 2008.

(B) AMEA's request for hearing is hereby denied, as discussed in the body of this order.

⁵² See, e.g., *ExxonMobil Corp. v. Entergy Serv., Inc.*, 118 FERC ¶ 61,032, at P 13 (2007); *Northwest Pipeline Corp.*, 88 FERC ¶ 61,298, at 61,911 (1999), *pet. for review denied sub nom.*, *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001) (finding that "[m]erely because [an order] and related or similar cases are pending on appeal before the Court, the Commission is not required to hold other cases involving the same issues in abeyance pending the outcome of those appeals. Such a requirement would unnecessarily delay the Commission's work, to the detriment of the pipelines and their ratepayers. If the Court determines that aspects of the Commission's [contested] policy are inappropriate, cases that have followed those aspects of the policy may be addressed again where the parties have preserved their positions through requests for rehearing or through appeal."); see also 16 U.S.C. § 825l (c) (2000).

(C) AMEA's request to make outcome of the instant proceeding contingent on the outcome of the proceedings in Docket No. EL06-93 is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.